UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	8 U.S.C. §1324a Proceeding
v.	)	CASE NO. 90100149
CHARO'S CORPORATION d.b.a., "CHARO'S RESTAURANT", Respondent.	)	

FINAL DECISION AND ORDER REGARDING CLAIM FOR ATTORNEYS' FEES AND COSTS UNDER EAJA

E. Milton Frosburg, Administrative Law Judge

Appearances:

Dayna M. Dias, Esquire
Elizabeth J. Hacker, Esquire
for Immigration & Naturalization Service
Peter Anthony Schey, Esquire
Carlos Holquin, Esquire
for Respondent

TABLE OF CONTENTS

I. PROCEDURAL HISTORY

On August 29, 1991, I issued my Final Decision and Order, which included Findings of Facts and Conclusions of Law, regarding the merits of the above-referenced case which was brought based upon a four count Complaint. In that Order, I dismissed Count I in its entirety, with prejudice, based upon Complainant's unopposed oral Motion To Dismiss made at the hearing on April 15, 1991. In addition, in Counts II, III, and IV, Respondent was found to have violated 8 U.S.C. §1324a(a)(1)(B), failure to prepare or present for inspection Forms I-9 for the individuals named in my Order and was required to pay a civil penalty of twelve thousand four hundred seventy-five dollars ($12,475.00) for those violations. On May 15, 1991, Respondent filed a timely request for attorney's fees and costs for its defense of Count I.

II. JURISDICTION

My decision of August 29, 1991 now stands as the final OCAHO decision as neither party requested a review by the Chief Administrative Hearing Officer (CAHO), the CAHO did not modify it, and no appeal was entered at an appropriate federal circuit court. Therefore, it is now appropriate to address Respondent's request for attorneys' fees and costs. See 5 U.S.C. § 504(a)(2); Dole v. Phoenix Roofing Inc., 922 F.2d 1202 (5th Cir. 1991). See also Mester Mfg. Co. v. INS, 900 F.2d 201, 203 (9th Cir. 1990) (ALJ in IRCA proceedings has the power to grant EAJA fees).

In Respondent's application for attorney fees and costs, Respondent directed my attention to 28 U.S.C. §2412 and to Mester Mfg. Co. v. INS, 900 F.2d 201, 203 as the authority for its claim. In its response, Complainant took the position that I lacked jurisdiction to award the relief Respondent requested because Respondent's citation was to incorrect authority.

A review of the regulation cited by the Respondent reveals that it applies to recovery of attorney fees and costs for civil actions brought before federal courts and not those brought in administrative proceedings. Therefore, it is relevant that this proceeding was held pursuant to enforcement of section 274A of the Immigration and Naturalization Act and was conducted in accordance with the requirements of the Administrative Procedures Act, 5 U.S.C. §554 and 8 U.S.C. §1324a(e)(3)(b).

Complainant is correct that my authority to award fees and costs in this matter does not stem from 28 U.S.C. §2412 as Respondent alleges. Moveover, Mester, as cited by the Respondent for the premise that he may apply for fees in an administrative proceeding under 28 U.S.C. §2412, does not support his position.

With the EAJA statutes, Congress intended to allow recovery of legal fees and expenses by certain parties litigating against unreasonable government action. Attorneys' fees and expenses arising from an administrative adjudication governed by 28 C.F.R. section 68 should be applied for under

the Equal Access to Justice Act (EAJA) found at 5 U.S.C.§504. A review of the wording found in 28 U.S.C. §2412, however, reveals how similar its language is to the language found in 5 U.S.C. §504. The relevant language states:

> (A) court shall award to a prevailing party other than the United States fees and other expenses ...incurred by that party in any civil action ... brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. §2412(d)(1)(A).

Substantially the same language is found in 5 U.S.C. §504:

> An agency that conducts an adversary adjudication shall award to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. §504(a)(1)

I have carefully considered all arguments and have carefully reviewed both 28 U.S.C. §2412 and 5 U.S.C. §504. Taking into account the Congressional intent of EAJA, the similarity of the wording in both EAJA statutes, and the ease of considering an administrative proceeding as a court proceeding, I find that the fair and reasonable way to handle this particular situation is to hold that Respondent made a technical error and intended to file under 5 U.S.C. §504. See H. R. Rep. No. 1478, 96 Cong., 2d Sess. 5-6 (1980), reprinted in 1980 U.S.Code Cong. & Admin.News 4953, 4884.

My holding on this point is in line with U. S. v. ABC

Roofing & Water Proofing, Inc., 2 OCAHO 382 (1991). In no way, though, should this finding to be taken to be blanket forgiveness or permission for citations to incorrect authority. Each case must be viewed on its own facts and circumstances before a determination may be made as to whether there is a jurisdictionsal issue or whether there a citation error has been made.

Thus, I hold that, in this case, I am not deprived of authority to consider Respondent's claim for attorney's fees and costs.

III. ANALYSIS OF RESPONDENT'S CLAIM FOR FEES

A. STATUTORY REQUIREMENTS FOR EAJA CLAIMS

Recovery of attorney fees and costs from administrative proceedings may not be had unless the petitioner fulfills the statutory requirements in 5 U.S.C. §504. In addition to timely filing his claim, he must:

1. establish that he is an eligible party for recovery under 5 U.S.C. §504(b)(1)(B); and
2. establish that he is a prevailing party; and
3. allege that the government's position was not substantially justified.

5 U.S.C. §504

B. REQUIREMENT THAT PETITIONER QUALIFY AS A PARTY

A threshold requirement for an EAJA claim petitioner in an administrative case is to establish that he is eligible to recover under this statute. Love v. Reilly, 924 F.2d 1492 (9th Cir. 1991). In this case, where the Respondent is a corporation, the relevant statutory language states:

> "party" means a party, as defined in section 551(3) of this title, who is ...(ii) any owner of an unincorporated business, or any partnership,

> corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated.

5 U.S.C. §504(b)(1)(B)

In other words, it is the petitioner's burden to establish in its application for fees and costs that it meets the above definition. Love; 5 U.S.C. §504.

In this case, Respondent has not made any allegation or showing that he is a party as defined under 5 U.S.C. §504(b)(1)(B). In fact, he has not even alluded to this requirement in his motion, filed on May 15, 1991, nor in his supplemental motion filed on June 24, 1991.

I note that Respondent was on notice that it had not met this statutory requirement at the time it filed its supplemental motion since this deficiency was pointed out in Complainant's Response to Respondent's Motion, filed on June 20, 1991. I further note that this threshold requirement of eligibility as a party is also found in 28 U.S.C. §2412. As such, the argument, if raised, that Respondent did not establish this point because he had cited to 28 U.S.C. §2412 instead of 5 U.S.C. §504 originally would be without merit. Moreover, I have been very liberal in accepting supplemental motions and documentation in this case, but, despite this, Respondent has made no effort to date to remedy the deficiency.

With the passing of EAJA, Congress intended to allow certain private parties of limited means the ability to defend

themselves against unreasonable government conduct in a legal setting by awarding them the legal expenses and costs expended after they had shown that they had prevailed. See, e.g., S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Com., 672 F.2d 426 (5th Cir. 1982). The statute is very specific though; all prevailing parties are not eligible for recovery. Only those parties meeting the definition of "party" found in 28 U.S.C. §551(3) and 5 U.S.C. §504(b)(1)(B) may qualify. In considering whether Respondent is an eligible party under 5 U.S.C. §504, I have considered whether I could, or should, infer that it meets the statutory requirements since it has not made any showing.

I have before me some financial information, i.e., some tax returns, some testimony on the value of the land at the site of Respondent's operation, and some testimony that Respondent has lost money for the past several years of its operation. Further, all indications are that Respondent did not employee more than five hundred (500) employees at the time of the initiation of the adversary adjudication.

I find it instructive that although Congress intended to limit the type of prevailing party who could recover, it did not make the showing of eligibility onerous to the claimant. In fact, it did not limit in any way the manner of establishing eligibility. The only requirement is that the Respondent "show" that it is eligible to receive the award under the statute.

In this case, I hold that it would be inappropriate for me to infer that Respondent is an eligible party under 5 U.S.C. §504. Although I have some financial information before me regarding the Respondent's worth, I do not feel that I have enough information, nor do I have the specialized experience, to make a determination of Respondent's net worth at the time of the adjudication's initiation. Further, due to the statute's clear language on this point, I do not believe that Congress intended this Court to infer the threshold determination of party eligibility when Respondent has all the needed information at his fingertips and can fulfill his burden with ease. See c.f. U.S.A. v. ABC Roofing, 2 OCAHO 382 (1991).

As such, after serious consideration of all matters, I hold that an applicant for EAJA fees under 5 U.S.C. §504 carries the burden of establishing in his application that he qualifies as a party eligible to recover. This requirement may be established by as little as an affidavit from a knowledgeable party that Respondent's net worth was less than seven million dollars ($7,000,000) at the time of the adjudication's initiation and employed fewer than five hundred (500) employees at that time. Therefore, I hold that in this case, that where Respondent has made no showing that he is an eligible party as defined in 5 U.S.C. §504(b)(1)(B), Respondent's application for attorney fees and costs for it defense of Count I must be denied.

Despite this finding, I have proceeded with a full

analysis of the requirements for EAJA recovery for the parties' edification.

C. PREVAILING PARTY REQUIREMENT

A fee claimant, after meeting the timeliness and party eligibility requirements, must establish that he is the prevailing party in order to be eligible for any awarding of fees. Case law has interpreted this to mean the party who has succeeded on any significant claim which afforded him some of the relief he sought, either pending the suit, during the actual progress of the suit, during litigation or at the end of litigation. Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, (1989); see also Hensley v. Eckerhart, 461 U.S. 424, 433 n.7.

In Garland, the Supreme Court stated that, in order for the plaintiff to be considered a prevailing party, he must be able to point to the resolution of a dispute which changed the legal relationship between itself and the defendant. However, an insignificant technical victory which achieved this result would be insufficient to support prevailing party status. The Court stated further that the degree of plaintiff's overall success goes to the reasonableness of the award and not to the availibility of the fee award. Garland; see also Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988) (claimant need not prevail in every aspect of the case to be a prevailing party under the statute). The Court noted in Hanrahan v. Hampton,

446 U.S. 754 (1980) that a procedural victory will not result in a finding that the claimant is a prevailing party.

In United States of America v. Mester, 1 OCAHO 44 (1989), the CAHO employed a two prong test in determining whether the fee claimant, a Respondent, was a prevailing party. The first prong required a determination of whether the claimant had substantially received the relief sought. The second prong required a determination as to whether the claimant's defense of the suit could be considered a catalyst that motivated the Immigration & Naturalization Service (Service) to provide the requested relief. Id at 7.

At this point, a brief review of the facts of the instant case is appropriate. This case was brought on a four count Complaint. Counts II, III and IV were substantially disposed of by summary decision in favor of the Service prior to hearing. However, the parties were unable to agree regarding Count I and it proceeded to trial.

At hearing, the Service intended to call at least four (4) witnesses in its case-in-chief. They included the Service's Special Agent Dennis Smith who conducted a portion of underlying investigation prior to the filing of the .nt, Maria Gabriella Rodriguez, an individual whom the Service alleged was knowingly hired without valid work authorization and named in Count I, and the Hernandez brothers, who were also allegedly knowingly hired without proper work authorization and also named in Count I.

At hearing, although Special Agent Smith testified, the Service could not present the Hernandez brothers for examination as their whereabouts were unknown. Further, during Respondent's cross-examination of Ms. Rodriguez, it became clear that her testimony was not credible. Since the testimony of one of its crucial witnesses had been destroyed on cross-examination, and two of its witnesses could not be produced, the Service made an oral motion in chambers for dismissal of Count I. I granted the unopposed motion on the record.

It is clear that Respondent achieved the result that it desired from its defense, dismissal of Count I. It is further clear that the Service's Motion To Dismiss Count I was a result of the Respondent's cross-examination of Complainant's witness and that the relationship between the Service and the Respondent changed with the dismissal of the charges since there was no longer any case as far as Count I was concerned. Obviously under the facts of this case, the dismissal of Count I would not qualify in any way as a technical victory.

It is important to mention that although in some instances the submission of a Motion to Dismiss might be considered a procedural event, this case does not fall under that umbrella since the Service did not make its motion to dismiss Count I prior to, or even at, the beginning of the hearing. This action was a direct result of Respondent's defense of the suit. Thus, Respondent has met the test of

prevailing party, it achieved the objective it sought and its defense was a catalyst for achieving this objective.

D. SUBSTANTIAL JUSTIFICATION

The EAJA statute mandates that the Court award EAJA fees to a prevailing party, other than the United States, unless the government's position was substantially justified or there are other special circumstances which would make the award unjust. 5 U.S.C. 504; Pierce v. Underwood, 108 S.Ct 2541 (1988); Mester Manufacturing Company v. U.S. Immigration & Naturalization Service, 900 F.2d 201 (1989). It is important to note that Congress did not intend that a finding be made that the government's position wasn't substantially justified just because it lost the case. Dole v. Phoenix Roofing, Inc., 922 F.2d 1202, 1209 (5th Cir. 1991) (quoting H.R.Rep. No. 1418, 96th Cong., 2d Sess. at 10, 18; 1980 U.S.C.C.A.N. at 4989, 4987); Foster v. Tourtellotte, 704 F.2d 1109, 1112 (9th Cir. 1983); U. S. v. Meister, 1 OCAHO 44 at 12. However, the burden of proving that it was substantially justified falls to the government, although this burden is not insurmountable. Love v. Reilly, 924 F.2d 1492 (9th Cir. 1991); Dole.

In Pierce, the Supreme Court interpreted the meaning of "substantially justified" as used in 28 U.S.C. §2412(d)(1)(A). Due to the substantial similarity of the wording in 28 U.S.C. §2412 and 5 U.S.C. §504, as well as the identical intent of the two statutes, there is no reason not to accept this interpretation for EAJA cases brought in IRCA proceedings.

The Court explained that the phrase "substantially justified" meant "not justified to a high degree" but rather "justified in substance or in the main". Pierce at 2550. The Court stated that this meant "justified to a degree that could satisfy a reasonable person. That is no different from the 'reasonable basis both in law and fact' formation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue." Id. (other citations omitted); see also Foster v. Tourtellotte; Bay Area Peace Navy v. United States, 914 F.2d 1224 (9th Cir. 1990); Mester, 900 F.2d at 204. The Court further stated that "substantially justified" means "more than merely undeserving of sanctions for frivolousness". Pierce at 2550.

The Ninth Circuit has held that that the court must consider the reasonableness of both the underlying government action at issue and the position asserted by the government in defending the validity of the action in court before it finds that the government was substantially justified. Bay Area Peace Navy; Kali v. Bowen, 854 F.2d 329, 334 (9th Cir. 1988). The Ninth Circuit stated that this standard was the best way to achieve EAJA'S "remedial purpose" since the court would look at the totality of the circumstances in both prelitigation and during the trial. Thomas v. Peterson, 841 F.2d 332, 334 (9th Cir. 1988); Rawlings v. Heckler, 725 F.2d 1192 (9th 1984).

In U.S.A. v. Mester, 1 OCAHO 44 (1989), the CAHO used the three part test set out in United States v. Yoffe, 775 F.2d

(1st Cir. 1985), cited by the Supreme Court in Pierce, to rmine whether the government was substantially justified. er at 11. The test requires a determination of each of the following issues:

1. Did the government have reasonable basis for the facts it alleged?
2. Did the government have a reasonable basis in law for its theories?
3. Did the facts support the government's theory?

at 12.

The CAHO stated that the government must show that a onable person in the same circumstances would have come to same belief as the government and must also show both ual reasons for the allegations it made and a legitimate ef that the respondent violated 8 U.S.C. §1324a. Id.

1. REASONABLENESS OF THE UNDERLYING GOVERNMENT ACTION

a. DID THE GOVERNMENT HAVE A REASONABLE BASIS FOR THE FACTS IT ALLEGED?

In Count I, the government alleged the following:

1. Maria Gabriella Rodriguez, Ruben Hernandez-Elorriaga and Ricardo Hernandez-Elorriaga were hired for employment by Charo's Restaurant after November 6, 1986.

2. These individuals were aliens, not authorized for employment in the United States at the time of hire.

3. Charo's Restaurant knew at the time of hire that these individuals were not authorized to work in the United States, or in the alternative, that Charo's Restaurant continued to employ these individuals knowing that they were unauthorized to work in the United States.

The above three named individuals were apprehended by Service at Charo's Restaurant during an inspection. After

their apprehension, all three gave separate sworn statements to the Service in which they admitted that they were employed by Charo's Restaurant after November 6, 1988, that they had entered the United States illegally, that they did not have work authorization and that Carmen Lesher, Charo's sister and agent of the corporation, was aware that they were illegal aliens and did not have work authorization. Complainant's Exhibits 2, 3, 33. All three statements were internally consistent and consistent with each other.

These facts are enough to show that the Service had a reasonable basis for the facts alleged.

b. DID THE GOVERNMENT HAVE A REASONABLE BASIS IN LAW FOR ITS THEORIES?

The Service alleged in Count I that Charo's had knowingly employed three named individuals when they were unauthorized to work in the United States, or in the alternative, continued to employ these people after learning that they were unathorized to work in the United States.

Section 274A of the Immigration & Nationality Act states, in relevant parts:

> It is unlawful for a person or other entity to hire, ... for employment in the United States an alien knowing the alien is an unauthorized alien with respect to such employment.
>
> It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1) to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

Section 274A(a)(1) of the Immigration and Nationality Act.

A review of these sections makes it is clear that the government had a reasonable basis in law for its theories.

c. DID THE FACTS SUPPORT THE GOVERNMENT'S THEORY?

Based on the circumstances of these individual's apprehension and their sworn statements, which appeared credible at the time, it was reasonable for the government to go forward with the Notice of Intent To Fine and the Complaint. I find that a reasonable person in the same circumstances would have come to the same belief as the government did and that the government had a legitimate belief that Respondent have violated 8 U.S.C. §1324a. Thus, this prong of the test is satisfied. Therefore, I find that the government had a reasonable basis both in law and fact for its underlying action.

2. WAS THE POSITION ASSERTED BY THE GOVERNMENT IN DEFENDING THE VALIDITY OF THE ACTION IN COURT REASONABLE?

At this point, I feel that it is important to state that this has been a difficult case in which to make a determination on whether the government was substantially justified in going forward with its case on Count I at hearing. This was due, in part, not only to the many submissions of lengthy motions, lengthy opposition briefs, late submissions of documentation but to the allegations of bad faith made by both sides.

I spent much time reviewing these serious allegations which also included allegations that witnesses were withheld or secreted and allegations that potential evidence was withheld. In considering them, I have reviewed both parties

statements, the record, my notes and my recollections of thiscase. Based on this review, I do not believe that there was any intentional conduct on either side that would constitute bad faith or unethical behavior.

It is, of course, appropriate for the parties to conduct their case in any manner they wish as long as they do so ethically and in good faith. In this case, it has been apparent that counsel for both sides, for whatever reasons, have been less than cooperative with each other which I believe was the main contributing factor in the need to litigate Count I in court. Although there is a fine line between tactical decisions and actions and bad faith, in this case I do not find that either party passed over that line. However, I think that all parties should see this case as instructive on the need for cooperation between parties.

Another difficulty in this case was the fact that Respondent obtained new counsel subsequent to the hearing. This circumstance, to my mind, raises the question of whether the new counsel had been, or if it was even possible to, advise him of all communications, tactical decisions and other aspects of the case. Since this case had already spanned over twelve months before new counsel's appearance, it seems implausible that he would be privy to all the nuances of the case that had come before his appearance. In addition, I do not believe that he can know all the issues, all the circumstances and all the

possibilities considered by former counsel before he made any tactical or legal decision. Thus, when considering allegations made by new counsel, I have taken this into account.

Respondent alleges, basically, that if the Service had engaged in a more thorough pre-hearing investigation, it would not have proceeded with the hearing on Count I. Respondent has made many assertions and I will attempt to address the most relevant ones individually.

One of Respondent's assertions is that there were numerous witnesses that the Service could have interviewed who would have vouched for the fact that Charo's had regularly requested work authorization documentation since approximately March, 1989. As both the Hernandez bothers and Ms. Rodriguez began work for Charo's in 1988, I find this argument to be without merit and will not consider it.

Respondent also states that it provided the Service with "precise" information about the Hernandez brothers previous employers. The object desired by the Respondent was a Service contact of these employers. Respondent argues that if the Service had made these suggested contacts, the Service would have seen that the brothers' sworn testimony was false.

Respondent's reasoning is that if the Service were to to ascertain that the brothers had had some sort of work authorization when they had their prior jobs, even if it were fraudulent, it would stand to reason that they used this documentation at Charo's. This would prove that there was no knowing hire by Charo's, since if the brothers' were in

possession of this documentation, there would be no reason for Carmen Lesher to instruct them to get false documentation as alleged by both Hernandez brothers in their sworn statement. Complainant's Exhibit 2, 3.

At first glance, this argument has merit. However, although Respondent may have an alternative plausible explanation of the facts, which in this case amounts to a defense, that alone is not enough to find that the government was not substantially justified in proceeding to hearing. The Sixth Circuit held that while the government has a duty to investigate, it was substantially justified in filing a complaint and proceeding to hearing where the defendant had made oral statements regarding his defense, but did not provide the government with proof when requested and waited until the merits hearing to provide the written proof of the defense. Lion Uniform, Inc. v. N.L.R.B., 905 F.2d 120 (6th Cir. 1990) [discussing Leeward Auto Wreckers, Inc. v. N.L.R.B., 841 F.2d 1143 (D.C. Cir. 1988)].

The case at hand is similar. Although Respondent states that it supplied the government with precise information regarding the Hernandez brothers' prior employers, this did not constitute proof of a defense to the charges of knowing hire. The government is not obligated to follow every lead or theory offered by the defense. "Any such duty to investigate will obviously be shaped by circumstances at hand." Leeward at 1147. Service counsel has the right to conduct her case as she

deems necessary, adhering to ethical and legal considerations.

It is clear to me that even if the government had contacted the brothers' former employers specified by Respondent, and even if those individuals had verified that the brothers had had documentation at the time of those hires, that would not establish that Carmen Lesher did not tell them to get fraudulent documentation. It is conceivable that the brothers had lost their documentation, if they had had any, since they used it previously, and did not have it to show Carmen Lesher. It is also conceivable that their old documentation, if they had had any, did not look legal and they were instructed to get better quality documents. Please note, I do not hold or find that either of these scenarios occurred. I am simply stating that these scenarios are plausible possibilities even if the Respondent's claims were also true. Although I might make a different call if I were prosecuting this case, I find that it was not unreasonable for the Service not to contact the Hernandez brothers' former employers.

Respondent also argues that the Service Agent's questioning at the time of the taking of the Hernandez brothers' statements was less than adequate, i.e., he did not ask many questions which might have elicited important details surrounding the entire work situation which would have shown that these statements were false. However, the brothers' statements, taken in conjunction with each other, do support the bringing of the Complaint. As to whether the brevity of

these statements is relevant to the Service going forward to hearing regarding these individuals, I find it irrelevant to the issue.

The Service argues that although, at the point the hearing began, it was apparent that the brothers could not be located by either party and would not appear to testify, it had hoped to prove the allegations regarding the Hernandez brothers on the strength of the testimony of the interviewing Service agent and the brothers own sworn signed statements. In addition, the Service was relying on Maria Rodriguez' testimony, that Carmen Lesher had known that she was an illegal alien, that Carmen Lesher knew that she had no valid work authorization and that Carmen Lesher had told Maria to obtain fraudulent documentation, as further support for the truth of the brothers' statements.

However, when Maria Rodriguez' testimony proved not to be credible, the Service's strategy was defeated. It is very relevant that the Service did not know that this would be the turn of events until cross-examination. Being surprised at trial by the testimony of your own witness is, at the very least, embarrassing, and in some cases might support a finding that the government was not substantially justified. However, in this case, where the record and the testimony show that the Respondent was in possession of rebuttal evidence, which did not have to be revealed prior to trial and which the Respondent chose not to reveal prior to trial, I find that this is not the

case.

I have considered each of the Respondent's allegations both individually and in unison. The Service made a tactical decision within its domain. I find that the Service's strategy in keeping these individuals included at hearing, although it might not have been my strategy if I had prosecuted the case, is understandable. Based on all the above, I find that it was reasonable for the Service to go forward with the allegations regarding the Hernandez brothers.

The remaining issue is whether the government was substantially justified in proceeding to hearing on Count I as it applied to Ms. Rodriguez. Respondent again asserts that the statement taken by Special Agent Smith was less than adequate. However, the sworn statement does include her statements that she told Carmen Lesher that she did not have immigration papers, but was hired anyhow. I find that brevity of a sworn statement is not enough to find that the government was not substantially justified in proceeding.

In addition, I have reviewed Ms. Rodriguez' videoed sworn statement which was available to the Respondent. Complainant's Exhibit 33. In opposition to Respondent's allegation of a less than detailed questioning of this witness, this statement was taken over several hours and is very detailed. Ms. Rodriguez was asked, among other things (and in opposition to Respondent's assertions), the name of the newspaper from which she initially learned of the job at

Charo's, how she found the job, how and who interviewed her, how she came to Hawaii and Kauai, who met her, what that person looked like and what he was wearing, what her work duties were, who explained her duties to her, whom she advised of her illegal immigration status and her lack of work authorization, and when this occurred.

It is appropriate to note at this point that in reviewing the videoed statement of Mr. Juarez, an individual originally named in Count II, that the details given by Mr. Juarez regarding his hire and relocation are just about identical to those given by Ms. Rodriguez' regarding her hire and relocation. This correlation obviously lends credence to Ms. Rodriguez' statement and weighed in the determination to proceed to hearing.

Respondent argues that Ms. Rodriguez was kept incommunicado and that it was intentionally deprived of access to her. Respondent's Motion For Attorney Fees and Costs at page 26. At first glance, this argument raises concerns. However, a review of the record reveals that Mr. Osterloh, an associate of the previous counsel, interviewed Ms. Rodriguez at the time of her apprehension and no request for deposition was made at that time. Respondent was given an opportunity to depose Ms. Rodriguez prior to her testifying at hearing and I held there was no prejudice to either party in this late deposition.

I must again point out that although Respondent did have

evidence that Ms. Rodriguez had not given truthful sworn testimony to the Service, it did not provide the Service with proof of it. It was not their duty to do so. Further, there was no requirement that it try its case before the Service. It had every right to proceed to hearing and show its evidence to me for determination of the outcome. However, by not providing the Service with its rebuttal evidence, it was evident to all concerned that this case would go to hearing.

But this is not the issue. Neither is whether the Service was likely to win. Foster v. Tourtellotte, supra. The issue is whether, based on a reasonableness standard, the Service was substantially justified in proceeding to hearing.

In reviewing the record, the parties instant motions and briefs, Ms. Rodriguez' testimony, and the relevant law, I find that the Service was justified in proceeding to hearing on Count I in regard to Ms. Rodriguez. I specifically note that Ms. Rodriguez' testimony appeared, prior to hearing to be credible, internally consistent and consistent with details found in both Mr. Juarez' and the Hernandez brothers' statements. Further, the Service was not in possession of the Respondent's rebuttal evidence.

Based on the above, and the totality of the circumstances, I find that Respondent's motion for EAJA fees must be denied, not only because Respondent did not show that it was an eligible party under the statute, but because the

government's position was substantially justified. Further, all motions previously filed in this case, but not ruled on, are denied.

This Decision and Order shall become the final Decision and Order of the Attorney General, unless one of the parties files a written request for review of the decison together with supporting arguments with the Chief Administrative Hearing Officer, 5107 Leesburg Pike, Suite 2519, Falls Church, VA 22041, as prescribed in 28 C.F.R. 68.53, or the Chief Administrative Hearing Officer modifies or vacates it within thirty (30) days of the date of this Order. 28 C.F.R. 68.53.

IT IS SO ORDERED this 22nd day of January, 1992, at San Diego, California.

E. Milton Frosburg

E. MILTON FROSBURG
Administrative Law Judge

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